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No. 71-1285

In the Supreme Court of the United States

OCTOBER TERM, 1971

PFIZER, INC., ET AL., PETITIONERS

v.

HON. MILES W. LORD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 3a-30a) is not yet reported. The district court did not render a written opinion.

JURISDICTION

The court of appeals entered its judgment on February 15, 1972 (Pet. 2a). The petition for a writ of certiorari was filed on April 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the facts alleged in petitioners' affidavit, in support of their motion for the recusal of the re-

spondent district judge, establish that he was personally biased or prejudiced against them.

STATUTE INVOLVED

28 U.S.C. 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

STATEMENT

Petitioners seek the recusal of the respondent Lord as the district judge presiding over fifty-six related antitrust suits which were assigned to him initially by the Judicial Panel on Multidistrict Litigation. In these suits, the various complainants charge the petitioners with committing fraud on the Patent Office and conspiring to exclude competition and to fix prices for broad spectrum antibiotics in violation of the Sherman Act. The private plaintiffs seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. 15; the United

States seeks single damages pursuant to Section 4A of the Act, 15 U.S.C. 15a, from all the petitioners and seeks cancellation of the patent for tetracycline issued to petitioner Pfizer.

This litigation had its inception in a proceeding the Federal Trade Commission instituted in 1958 charging that Pfizer made false statements to the Patent Office and withheld information from it to obtain its patent on tetracycline; that petitioner Cyanamid and Bristol withheld information from the Patent Office; and that all the petitioners conspired to maintain arbitrary prices and to exclude competition in the broad spectrum antibiotic market in violation of Section 5 of the Federal Trade Commission Act. The Commission divided two to two on the price fixing charges but found that petitioners Pfizer and Cyanamid made misrepresentations of material facts to the Patent Office and thereby obtained a patent for Pfizer which otherwise would not have been issued. This finding was upheld by the court of appeals. *Chas. Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (C.A. 6), certiorari denied, 394 U.S. 920.

Three years after the Commission commenced its proceeding, the petitioners were indicted for violating Sections 1 and 2 of the Sherman Act. The jury convicted them, but the convictions were reversed on the basis of error in the trial court's charge to the jury. *United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32 (C.A. 2), affirmed *per curiam* by an equally divided court, 404 U.S. 548.

The first private antitrust suits were filed in 1963 and 1964. Following the verdict in the criminal case,

more than 140 new actions were filed. In 1968 the Judicial Panel on Multidistrict Litigation transferred all these actions to the Southern District of New York for coordinated pretrial proceedings pursuant to 28 U.S.C. 1407. The majority of these cases were later disposed of by a settlement approved by the district court. See *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y.), affirmed, 440 F.2d 1079 (C.A. 2), certiorari denied, 404 U.S. 871.

In December of 1970 the remaining "non-settling" cases were assigned by the Judicial Panel to Judge Miles W. Lord for pretrial proceedings. In May of 1971 Judge Lord, sitting in the Southern District of New York by designation of the Chief Justice, transferred the majority of those cases to Minnesota for trial. In September 1971, shortly after the transfer to Minnesota was upheld,[1] the petitioners filed a motion seeking Judge Lord's recusal (Pet. 31a–33a), accompanied by a joint affidavit setting forth allegations of bias and prejudice (Pet. 35a–57a). Judge Lord denied the motion. Petitioners then sought mandamus in the court of appeals.

The court of appeals refused to issue the writ. After reviewing the lengthy background of this litigation (Pet. 5a–9a) and the law governing recusal (Pet. 12a–14a), the court examined at length the incidents which petitioners claimed in their affidavit demonstrated Judge Lord's "personal bias and prejudice" and held that they were legally insufficient to require disqualification.

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[1] On July 13, 1971, the Court of Appeals for the Second Circuit upheld the transfer, *Pfizer, Inc.* v. *Lord*, 447 F. 2d 122 (C.A. 2).

ARGUMENT

This case presents no important legal issues but only the correctness of the application of established principles to the particular facts. The standards governing the recusal of federal judges under 28 U.S.C. 144 are well settled, and the court of appeals, upon a careful analysis of the record, concluded that the district judge properly had declined to recuse himself. There is no occasion for further review of these essentially factual issues.

1. The statute requires that a party seeking to recuse a district judge file an affidavit showing that the judge has a "personal bias or prejudice" against it or in favor of an adverse party. The judge before whom such an affidavit is filed must accept the factual statements therein; the question for him to decide is the "legal sufficiency" of the affidavit, *i.e.*, whether "the reasons and facts for the belief the litigant entertains * * * give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger* v. *United States*, 255 U.S. 22, 33–34; see *United States* v. *Grinnell Corp.*, 384 U.S. 463, 580–583; *Peacock Records* v. *Checker Records, Inc.*, 430 F. 2d 85, 88 (C.A. 7), certiorari denied, 401 U.S. 975.

In order to be disqualifying, the alleged bias or prejudice must be "personal," that is, it must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp., supra*, 384 U.S. at 583; see

Hodgdon v. *United States*, 365 F. 2d 679, 866 (C.A. 8), certiorari denied, 385 U.S. 1029; *Tynan* v. *United States*, 376 F. 2d 761, 765 (C.A.D.C.), certiorari denied, 389 U.S. 845. Indiscreet expressions,[2] irritation at a party's dilatory tactics,[3] or hostility toward counsel,[4] do not establish the *personal* bias and prejudice which the statute requires for disqualification.

2. The court of appeals correctly held that under these standards the facts presented in petitioners' affidavit did not give "fair support to the charge of [personal] bias and prejudice" (Pet. 43a), and that Judge Lord therefore had properly declined to recuse himself. Neither of the two grounds for disqualification upon which petitioners principally relied required recusal.

a. Petitioners allege that Judge Lord's conduct during the deposition of Harvey Edelblute reflected personal bias and prejudice. Edelblute, who had prosecuted American Cyanamid's tetracycline patent application, is an important witness in this litigation and Judge Lord was present at the taking of his deposition.[5] According to petitioners, Judge Lord improperly "interrogated the witness" and acted as an "advocate for plaintiffs" (Pet. 39a).

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[2] *In re Lisman*, 89 F. 2d 898 (C.A. 2).

[3] *Refior* v. *Lansing Drop Forge Co.*, 124 F. 2d 440 (C.A. 6), certiorari denied, 316 U.S. 671.

[4] *Sanders* v. *Allen*, 58 F. Supp. 417 (S.D. Calif.).

[5] The court of appeals noted (Pet. 15a, n. 7) that 28 U.S.C. 1407(b) specifically contemplates the appointment of judges to preside at depositions in multi-district litigation. See also *Manual for Complex and Multi-district Litigation* § 2.32 (as revised May 18, 1970).

The court of appeals, upon reviewing the complete transcript of the deposition (which exceeded 1,000 pages) and tape recordings of a portion thereof, correctly concluded that Judge Lord's conduct at the deposition did not demonstrate personal bias or prejudice (see Pet. 17a–18a). As the court of appeals noted (Pet. 18a), a trial court has a duty to conduct judicial proceedings "'with a view to eliciting the truth'" and to ensuring "'that the issues are not obscured'" (Pet. 17a),[6] and to question a witness "in order to clarify facts and issues." "[M]uch of the difficulty," the court concluded, "was caused by the compound questions asked by the attorney for the United States who interrogated Edelblute" and by Edelblute's failure to "respond directly to the questions asked, even when they were asked in a clear-cut manner" (Pet. 16a). The judge's participation in the questioning of Edelblute and his comments did not require his recusal.

b. Petitioners also contend that Judge Lord's statements raising questions with respect to whether a proposed settlement of the suit between petitioners and the United States would be in the public interest manifested personal bias and prejudice against them. The proposed settlement contemplated the dismissal of Count I of the government's complaint, which alleged that Pfizer had committed fraud on the Patent Office in obtaining the tetracycline patent and sought cancellation of the patent. Since only the government can

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[6] See *Knapp* v. *Kinsey*, 232 F.2d 458, 466 (C.A. 6), certiorari denied, 352 U.S. 892; *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F.2d 160, 170 (C.A. 8).

obtain the cancellation of a patent procured by fraud on the Patent Office (see *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 175), Judge Lord correctly noted that Count I was "'fraught with public interest'" (Pet. 21a, n. 9). In these circumstances, it was appropriate for him to inquire about the terms of the proposed settlement and whether it would be presented to him for approval—particularly since the previous settlements in this litigation had required court approval. See *West Virginia* v. *Chas. Pfizer & Co.*, *supra*.

The inquiry also was proper because of the Judge's concern whether Pfizer's enforcement of the patent had involved fraud on the courts. Pfizer had instituted more than 35 infringement suits, at least five of which were brought in the Southern District of New York where Judge Lord had sat in the earlier stages of this case. See *American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757, 817 (C.A. 6). Since many of these cases had been settled with judicial approval, and since the government proposed to settle the only case that could result in cancellation of the patent as fraudulently procured, it was appropriate for Judge Lord to be concerned with whether judicial enforcement of the patent had constituted a fraud on the court (see *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245–251) and if so what the proper duties of the court and the United States might be in light of the proposed settlement. See *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U.S. 575, 580–581.

To whatever extent Judge Lord's comments with respect to the patent aspects of the case reflected hos-

tility, it was directed not against the petitioners but against the United States and the Patent Office and was based on information he had received in handling these cases. If Judge Lord "misconceived" his role in considering the settlement (Pet. 24a), that at most reflected an erroneous view of his authority and did not reflect personal bias or prejudice against petitioners. See *Ex Parte American Steel Barrel Co.*, 230 U.S. 35, 44.

3. Petitioners, relying upon the court of appeals' statement that "advocates construe statements of a trial judge in a somewhat partisan light and thus magnify the impact of any comment of the court" (Pet. 28a), argue that Judge Lord's actions here at least created an "appearance of bias and prejudice" which should have caused his recusal (Pet. 8). The court of appeals, however, did not conclude, as petitioners assert (Pet. 2), that Judge Lord "has caused the petitioners reasonably to believe that he 'has improperly prejudged the case.'." Rather, the court held that any "impression" petitioners might have formed that the judge was personally biased and prejudiced against their clients was, on the basis of what he actually said and did, unjustified (Pet. 28a–29a).

Although counsel frequently believe, because of what a trial judge states during the proceedings, that he is personally biased and prejudiced against their client, such belief does not warrant recusal. To the contrary, recusal is warranted only if the facts stated in the affidavit give "fair support" to the charge (*Berger* v. *United States, supra,* 225 U.S. at 33).

The court of appeals specifically applied that standard and concluded that petitioners' affidavit did not provide "fair support" for their charge of personal bias and prejudice. Judge Lord had gained extensive knowledge of these cases since they had been assigned to him in December 1970; he had entered more than 85 pre-trial orders.[7] However petitioners may have interpreted some of his comments and actions, they stemmed not "from an extrajudicial source" but reflected only "what the judge learned from his participation in the case" (*Grinnell, supra*). They did not require his recusal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Class action orders 1 through 25; discovery orders 1 through 16; miscellaneous orders 1 through 26; administrative orders 1 through 19.

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